

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Denial of Certification of  
the Variance Granted to Robert W. Hubbard  
by the City of Lakeland

**ORDER ON PETITIONS FOR  
INTERVENTION**

This matter is pending before Administrative Law Judge Kathleen D. Sheehy pursuant to a Notice and Order for Prehearing Conference and Order for Hearing dated January 23, 2007. The St. Croix River Association filed a Petition for Intervention on February 14, 2007; the Sierra Club filed a Petition for Intervention on February 21, 2007. Both Petitions for Intervention were timely filed under the First Prehearing Order. Robert W. Hubbard and the City of Lakeland objected to both Petitions for Intervention. The record with respect to the Petitions for Intervention closed on March 7, 2007, upon receipt of letter briefs from the parties and Petitioners for Intervention.

David P. Iverson, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Department of Natural Resources (Department or DNR).

Scott R. Strand, Esq., 1772 Eleanor Avenue, St. Paul, MN 55116, appeared for Robert W. Hubbard; Nicholas J. Vivian, Esq., Eckberg, Lammers, Briggs, Wolff & Vierling, PLLP, 1809 Northwestern Avenue, Suite 110, Stillwater, MN 55082, appeared for the City of Lakeland (Respondents).

A. W. Clapp, 757 Osceola Avenue #1, St. Paul, MN 55105, appeared for the St. Croix River Association; Andrew T. Shern, Murnane Brandt, 30 East 7<sup>th</sup> Street, Suite 3200, St. Paul, MN 55101-4919, appeared for the Sierra Club (Petitioners for Intervention).

Based upon the record in this matter, and for the reasons set forth in the attached Memorandum, IT IS HEREBY ORDERED as follows:

1. The Petitions for Intervention filed by the St. Croix River Association and the Sierra Club are hereby GRANTED. The Intervenors shall be permitted to participate as parties in this proceeding with all the rights and responsibilities associated with party status.
2. The Intervenors shall comply with the First Prehearing Order entered in this matter on February 15, 2007.

3. The Intervenor will be expected to work in a cooperative manner with the Department of Natural Resources to coordinate the presentation of evidence and avoid the introduction of duplicative evidence.

Dated: March 7, 2007

s/Kathleen D. Sheehy  
KATHLEEN D. SHEEHY  
Administrative Law Judge

## **MEMORANDUM**

Robert Hubbard is the owner of real property in the City of Lakeland that is located on and riparian to the lower St. Croix River, within the regulatory boundaries set by the DNR's comprehensive master plan for the lower St. Croix River.<sup>1</sup> The Lower St. Croix Wild and Scenic River Act authorizes the Commissioner of Natural Resources to adopt rules that establish guidelines and specify standards for local zoning ordinances applicable to the area within the boundaries covered by the comprehensive master plan. These guidelines and standards must be consistent with the Act, the federal Wild and Scenic Rivers Act, and the federal Lower St. Croix River Act of 1972.<sup>2</sup>

As alleged in the Notice and Order for Hearing, the existing residence on the Hubbard property is an 800-square foot home that is considered to be a substandard structure because it is located less than 40 feet from the bluffline.<sup>3</sup> Hubbard has proposed to construct a new single-family residence utilizing and incorporating as part of the new structure the footprint of the existing non-conforming residential structure. While a majority of the proposed residence will be located back from the existing structure, Hubbard proposes that the existing structure be demolished and that a wing of the new residence be located on the footprint of the old residence. Hubbard applied to the City of Lakeland for a variance to the 40-foot setback requirement. The City of Lakeland granted the variance, but the DNR denied certification of the variance pursuant to Minn. R. 6105.0540, subp. 3. Hubbard and the City of Lakeland filed a timely appeal.<sup>4</sup>

### **Petitions for Intervention**

The Petitioners seek to intervene as parties in this matter. The St. Croix River Association has existed since 1911, and its mission is to preserve the uses and beauty of the St. Croix River Valley. It has 250 paid members, most of whom own land on or near the St. Croix River. Attached to its Petition for Intervention is correspondence directed to the Commissioner of Natural Resources, alleging that Hubbard's project could be built in compliance with the long-standing Riverway ordinances without

<sup>1</sup> See Minn. Stat. § 103F.351, subd. 2 (2006) (Lower St. Croix Wild and Scenic River Act).

<sup>2</sup> *Id.*, subd. 4 (a) & (b); see also Minn. R. 6105.0351-.0550.

<sup>3</sup> Minn. R. 6105.0380, subp. 5.A(2), and Lakeland Ordinance Sections 302.01(18) and 402.01(5).

<sup>4</sup> Notice and Order for Prehearing Conference and Order for Hearing ¶¶ 6-10.

jeopardizing the fragile bluff area immediately adjacent to the bluffline and without exceeding the height restrictions. The Association urged the Commissioner to uphold the commitment of the federal, state, and local governments “who in partnership are seeking to maintain a consistent, carefully-balanced land use management program which allows reasonable development to occur and ensures the protection of the valley’s remarkable scenic character.” In this proceeding the Association intends to support application and enforcement of the minimum zoning standards on behalf of its membership, which it maintains has a particular right to expect enforcement of zoning standards to preserve and protect the riverway.<sup>5</sup>

The Sierra Club, through its Minnesota North Star Chapter, has also petitioned to intervene. The Sierra Club has approximately 22,000 members in Minnesota. More than 1,200 of these members also belong to the St. Croix Valley Interstate Group. The mission of these groups is to preserve and protect the St. Croix River and its surrounding area, while encouraging the responsible enjoyment of this national and Minnesota natural resource. The North Star chapter was instrumental in the passage of federal legislation designating the St. Croix as a Wild and Scenic River, as well as Minnesota laws and regulations enacted to protect the St. Croix River and the surrounding riverway corridor. The Sierra Club participated in proceedings before the Lakeland Planning Commission and provided material to the DNR for its consideration in making the decision to approve or deny the variance at issue in this matter. It further maintains that the variances granted by the City violate numerous specific rules regarding the height of the roofline, the setback requirement, the structure height, the placement of a new appurtenant structure in the bluff setback area, the alteration of a slope over twelve percent, and noncompliance with the hardship exception. In this proceeding, the Sierra Club intends to support the DNR’s decision to deny the variance. It maintains that granting a variance in this case would establish a precedent for subsequent development variances along the riverway and that the granting of such variances will erode the legal protections given to the river under state and federal law.<sup>6</sup>

The DNR supports the petitions for intervention of the St. Croix River Association and the Sierra Club.<sup>7</sup> The DNR maintains that the members of the St. Croix River Association, as landowners on or near the St. Croix River, have a unique historical perspective on the uses and management of the lower St. Croix River Valley and a vested interest in implementation of the rules adopted under the Lower St. Croix Wild and Scenic River Act. It further argues that the Sierra Club’s St. Croix Valley Interstate Group has actively participated in providing information to numerous governmental entities involved in management of the lower St. Croix River under the state and federal Wild and Scenic River Act. The DNR believes the Petitioners for Intervention have an interest in enforcement of the rules that extends beyond that of the general public and that they should be given party status in this matter.<sup>8</sup>

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<sup>5</sup> Petition for Intervention by the St. Croix River Association and attachment (filed Feb. 14, 2007); *see also* Response to Objections to Petition for Intervention (Feb. 24, 2007).

<sup>6</sup> Petition for Intervention by the Sierra Club (February 21, 2007).

<sup>7</sup> Letters from David P. Iverson to ALJ (Feb. 23, 2007, and March 2, 2007).

<sup>8</sup> *Id.*

Hubbard and the City of Lakeland object to the Petitions to Intervene. They contend that the Petitioners cannot show that (1) they have a legal right, duty, or privilege that may be determined in the contested case proceeding; (2) they may be directly affected by the outcome; or (3) their participation is authorized by statute, rule, or court decision. Furthermore, they argue that the DNR will adequately represent their interests and that intervention should be denied pursuant to Minn. R. 1400.6200, subp. 3. They do not object to the St. Croix River Association or the Sierra Club participating as non-parties pursuant to Minn. R. 1400.6200, subp. 5, and Minn. R. 1400.7150.<sup>9</sup>

## Discussion

The Rules of the Office of Administrative Hearings, Minn. R. 1400.6200, subp. 1, provide in relevant part:

Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall submit a timely written petition to intervene to the judge and shall serve the petition upon all existing parties and the agency. . . . The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case; shall show how the petitioner may be directly affected by the outcome or that petitioner's participation is authorized by state, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate petitioner's statutory right to intervene if one should exist.

In addition, the Administrative Law Judge "shall allow intervention upon a proper showing pursuant to subpart 1 unless the judge finds that the petitioner's interest is adequately represented by one or more parties participating in the case."<sup>10</sup>

The Petitioners contend, in letter briefs filed after their intervention petitions, that Minn. Stat. § 116B.09, subd. 1, authorizes intervention in this matter.<sup>11</sup> That section, which is part of the Minnesota Environmental Rights Act (MERA), specifies that "any partnership, corporation, association, organization or other legal entity having shareholders, members, partners, or employees residing within the state *shall* be permitted to intervene *as a party*" in "any administrative . . . proceeding" upon "the filing of a verified pleading asserting that the proceeding . . . involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state."<sup>12</sup>

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<sup>9</sup> Hubbard's Objection to Petition for Intervention (Feb. 16, 2007); City of Lakeland's Objection to Petition for Intervention (Feb. 16, 2007). See also Hubbard's Supplemental Memorandum in Opposition to Petitions for Intervention and to Discuss Minn. Stat. § 116B.09, subd. 1 (Mar. 7, 2007); Letter from Nicholas Vivian to ALJ (Mar. 7, 2007).

<sup>10</sup> Minn. R. 1400.6200, subp. 3.

<sup>11</sup> Letter from Andrew Shern and A.W. Clapp to ALJ (Mar. 7, 2007).

<sup>12</sup> Minn. Stat. § 116B.09, subd. 1 (emphasis added).

The Respondents contend the Petitioners cannot rely on the intervention rights provided by Minn. Stat. § 116B.09, subd. 1. First, in reliance on *Nizzardo v. State Traffic Comm'n*, 259 Conn. 131, 788 A.2d 1158, 1176-77 (2002), they argue the Petitioners failed to file a verified pleading explaining the factual basis for their environmental concerns. They contend that because there was no affidavit or sworn statement in support of the petitions to intervene, intervention must be denied.

In *Nizzardo*, the plaintiff had attempted to intervene and raise environmental issues in a proceeding in which a developer was attempting to obtain a certificate of operation for a proposed shopping center from a state traffic commission. The court held first that denial of a petition for intervention is not a final agency decision from which an appeal may be taken; second, it held that the Connecticut statute (comparable to MERA) authorizes intervention into an administrative proceeding only for the purpose of raising environmental issues that are within the jurisdiction of the agency in question. Because the plaintiff had failed to allege any facts explaining how the traffic safety issues pending before the state traffic commission might impact the environment, but instead merely parroted the words of the statute, the court found the commission had properly denied the intervention petition.<sup>13</sup> Specifically, the court said:

We thus conclude that a petition for intervention filed under [the statute] must contain specific factual allegations setting forth the environmental issue that the intervenor intends to raise. The facts contained therein should be sufficient to allow the agency to determine from the face of the petition whether the intervention implicates an issue within the agency's jurisdiction.<sup>14</sup>

Here, the Petitions for Intervention are signed by the president of the St. Croix River Association and counsel for the Sierra Club. The intervention petitions describe the environmental concerns the Petitioners wish to raise by specific citation to rule and statute, and the DNR clearly has jurisdiction to consider these concerns. The Administrative Law Judge concludes that *Nizzardo* provides no authority to deny the intervention petitions. The Petitioners have adequately alleged a factual basis for their environmental concerns.

Second, the Respondents allege the Petitioners for Intervention failed to make the factual allegations required by *State ex rel. Wacouta Township v. Brunkow Hardwood Corp.*, 510 N.W.2d 27 (Minn. App. 1993). There, the township brought suit in district court seeking to enjoin a landowner from logging timber in an area where bald eagles were nesting. The Court of Appeals described the requirements for alleging an independent cause of action brought under Minn. Stat. § 116B.03, subd. 1; the case involved no issue of intervention under § 116B.09, subd. 1. The requirements for establishing a *prima facie* cause of action under MERA might apply, for example, if the DNR had certified approval of the variance and the Petitioners then sought to enjoin construction of the residence through an action filed in district court. The requirement to

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<sup>13</sup> 788 A.2d at 1176-78.

<sup>14</sup> *Id.* at 1178.

plead a *prima facie* case to state a claim under MERA does not apply, however, to petitions for intervention in this administrative proceeding.

Because the Petitioners are associations having members within the state, and because their petitions adequately assert that granting of the variance at issue would be conduct that is likely to cause impairment of natural resources within the state, the Administrative Law Judge is required to grant their petitions for intervention by the mandatory language of Minn. Stat. § 116B.09, subd. 1.

Moreover, the Petition for Intervention meets the standards for intervention even absent a statutory right to intervene. The Petitioners have made an adequate demonstration that their members may be directly affected by the outcome of this case.<sup>15</sup> Based on this showing, intervention must be granted under Minn. R. 1400.6200, subp. 3, unless the existing parties adequately represent the petitioners' interests. The Respondents maintain that the DNR adequately represents the interests of the Petitioners. This argument might have more force if the DNR had made it; here, however, the DNR maintains the Petitioners should be given party status because their interests are different from those of the general public.

As a general matter, the showing required to establish that existing parties do not adequately represent the petitioner's interests is minimal.<sup>16</sup> In *Costley v. Caromin House, Inc.*,<sup>17</sup> the Minnesota Supreme Court noted that it has followed a policy of encouraging all legitimate interventions, and quoted with approval the following portion of Wright and Miller's treatise on Federal Practice and Procedure: "[I]f [the applicant's] interest is similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee."<sup>18</sup>

Although the interests of the DNR may be similar in certain respects to those of the Petitioners, since the DNR is expected to represent the public interest in protecting the environment, the DNR's interests are broader and not identical to those of the Petitioners. The Petitioners have shown that they have a particular interest in protecting the environmental character of the St. Croix River Valley. In addition, the Respondents have indicated they intend to challenge the propriety of the rules adopted by the DNR,

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<sup>15</sup> See, e.g., *In the Matter of the Revocation of the Private Fish Hatchery License for Spring Valley Ponds, LLC, and the Public Waters Restoration and Replacement Order No. W830836*, Ruling on Petition for Intervention, OAH Docket No. 11-2000-17249-2 (July 5, 2006) (Minnesota Center for Environmental Advocacy, Trout Unlimited, and the Minnesota Trout Association permitted to intervene in a proceeding to revoke the private fish hatchery license of Spring Valley Ponds); *In the Matter of the Application of the City of Brooklyn Park to Extend 73<sup>rd</sup> Avenue North Across a Wetland between Boone Avenue and Highway 169*, OAH Docket No. 6-2000-1385-2 (1987) (Northland Development Company's petition to intervene in a case in which the city sought to gain DNR approval to extend a road across a wetland was granted because Minn. Stat. § 116B.09, subd. 1, "required its approval" and because the petition met the standards contained in Minn. R. 1400.6200, subp. 1).

<sup>16</sup> G. Beck, M. B. Gossman, L. Nehl-Trueman, *Minnesota Administrative Procedure* § 6.2.3 (2d ed. 1998).

<sup>17</sup> 313 N.W.2d 21 (Minn. 1981).

<sup>18</sup> 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909, at 524 (1972).

which provide the basis for the zoning requirements adopted by the City and which govern the variance process. The Petitioners were involved in the passage of the state and federal legislation and the adoption of rules by the DNR, and they may be able to offer relevant evidence on this issue. The Petitioners have made the requisite showing that their interests are not adequately represented by the DNR in this matter. But because the positions ultimately taken by the DNR and the Petitioners may be similar, they will be expected to coordinate the presentation of evidence during the hearing so as to avoid duplication.

Unlike the situation in *State ex rel. Powderly v. Erickson*,<sup>19</sup> the petitions in this matter were timely filed, there has been an adequate showing that the interests of the Petitioners are not adequately represented by the existing parties, and the Petitioners do, in fact, allege that they have additional information that may be relevant to this proceeding. Their Petitions for Intervention are accordingly granted.

The record is not clear at this point whether the Sierra Club or the St. Croix River Association intend to present evidence on issues other than the set-back requirement. If there is a disagreement as to what the issues are for hearing, the parties should address this in the prehearing briefs to be filed pursuant to the First Prehearing Order.

**K.D.S.**

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<sup>19</sup> 285 N.W.2d 84 (Minn. 1979).